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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

NATIONAL ASSOCIATION OF BROADCASTERS
and
WTRF-TV, INC., *Petitioners,*
v.
FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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NATIONAL ASSOCIATION OF BROADCASTERS

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WTRF-TV, INC., *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners National Association of Broadcasters and WTRF-TV, Inc., pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit entered on November 21, 1968.

OPINIONS BELOW

The opinion of the court of appeals, which is not yet reported, appears at App. B, pp. 1a-40a.[1] The ruling of the Federal Communications Commission of June 2, 1967, reported at 8 F.C.C. 2d 381, appears at App. A, pp. 14-17, and the FCC's Memorandum Opinion and Order, released September 13, 1967, and reported at 9 F.C.C. 2d 921, appears at App. A, pp. 37-105.

JURISDICTION

The judgment of the court of appeals (App. B, pp. 41a-43a) was entered on November 21, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an FCC ruling that broadcasters of cigarette commercials must broadcast on a regular basis material presenting the viewpoint that cigarette smoking may be hazardous is within the FCC's authority under the Communications Act.

2. Whether the ruling, if authorized under the Communications Act, violates the First or Fifth Amendment.

3. Whether the ruling is precluded by reason of the Federal Cigarette Labeling and Advertising Act.

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[1] "App." references are to the pages of the separately bound volume which is an Appendix to this Petition, as well as to other Petitions filed with respect to the judgment of the court of appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment provides:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law."

The relevant provisions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151 *et seq.*, and of the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282 (1965), 15 U.S.C. §§ 1331 *et seq.*, appear at App. C, pp. 45a-49a.

STATEMENT OF THE CASE

The FCC ruling, affirmed by the court of appeals, requires each radio and television station which carries cigarette commercials to devote a significant amount of broadcast time, each week, to warnings of the asserted health hazard of cigarette smoking.

Proceedings before the FCC

The ruling was occasioned by a letter complaint filed with the FCC on January 5, 1967, by Mr. John F. Banzhaf, III, a resident of New York City, against television station WCBS-TV, an FCC licensee in New York City. (J.A. 2-5).[2] The complaint, to the effect

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[2] "J.A." references are to the pages of the Joint Appendix as printed for use by the court of appeals and included in the certified transcript of record.

that WCBS-TV had not fulfilled its asserted obligations under the FCC's Fairness Doctrine because it carried cigarette commercials and had not honored Mr. Banzhaf's request for free broadcast time, equal to that devoted to the commercials, to present contrasting views on the smoking and health issue, enclosed copies of correspondence between Mr. Banzhaf and WCBS-TV. (J.A. 5-13). WCBS-TV's position was that its coverage of the cigarette health issue had been both fair and objective and thus consistent with the Fairness Doctrine and that, in any event, that Doctrine was not a vehicle for FCC regulation of product advertising, a matter for which other agencies bore regulatory responsibility. (J.A. 13).

WCBS-TV was not notified of Mr. Banzhaf's letter to the FCC until June 2, 1967. On that date the FCC wrote the station, summarizing Mr. Banzhaf's letter to it, and informing the station that the Fairness Doctrine is applicable to cigarette commercials and that therefore "a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health." Its letter stated that it rejected Mr. Banzhaf's claim to equal time but that "each week" the station should allocate "sufficient time" to "the viewpoint of the health hazard posed by smoking." (App. A, pp. 14-17).

The FCC's letter to WCBS-TV was publicly released, and thereafter these petitioners,[3] among many

[3] Petitioner National Association of Broadcasters is a nonprofit organization of radio and television broadcasters whose membership includes some 3900 radio and television stations and all the radio and television networks. Petitioner WTRF-TV, Inc., is an individual broadcaster licensee.

others, filed petitions for reconsideration of the letter ruling, in response to which the FCC issued its Memorandum Opinion and Order. (App. A, pp. 37-105). The FCC provided that the requirement announced in its June 2 letter would have only prospective operation and would be applicable to all broadcast stations. (App. A, pp. 40-41, 82). The specific facts relating to WCBS-TV thus became irrelevant.

In its Memorandum Opinion and Order, the FCC brushed aside the contentions made in the petitions for reconsideration that its ruling violated the First and Fifth Amendments. The FCC simply pointed to its rejection of similar arguments in its previous order adopting rules governing personal attacks and political editorializing[4] and to the court of appeals' rejection of these arguments in *Red Lion Broadcasting Co.* v. *FCC,* 127 U.S. App. D.C. 129, 381 F.2d 908 (1967),[5] and said that "we see no valid distinction in the circumstances of this matter." (App. A, pp. 42-43).

The FCC then went on to reject statutory arguments that the Fairness Doctrine does not apply to product advertising.[6] It concluded that, "in any event . . . we

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[4] These rules were subsequently invalidated, as contrary to the First Amendment, by the Court of Appeals for the Seventh Circuit. Radio Television News Directors Ass'n v. United States, 400 F.2d 1002 (7th Cir. 1968). This Court has granted certiorari to review the Seventh Circuit's decision. 37 U.S.L.W. 3247 (Jan. 13, 1969).

[5] Certiorari was subsequently granted by this Court to review the *Red Lion* decision, 389 U.S. 968 (1967), and argument was postponed pending the Seventh Circuit's decision referred to in n. 4 *supra.* 390 U.S. 916 (1968).

[6] The Fairness Doctrine had been adopted by the FCC in a 1949 report, Editorializing by Broadcast Licensees, 13 F.C.C. 1246, in which it overruled a prior decision forbidding broadcaster advocacy of any side of any public issue (Mayflower Broadcasting Corp.,

think that the Commission clearly has the statutory authority to make this public interest ruling and to extend the Fairness Doctrine to cigarette advertising at this time." (App. A, p. 48). The "specifics of the Fairness Doctrine" aside, said the FCC, the ruling is in the public interest. (App. A, p. 87).

It had also been argued that the FCC's ruling was precluded by reason of the "comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health" established in the Federal Cigarette Labeling and Advertising Act (§ 2) and the moratorium in

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8 F.C.C. 333 (1941)) and determined that (1) every broadcaster has an affirmative obligation to devote significant portions of broadcast time to informing listeners on issues of public importance and (2) this obligation can be discharged only by the broadcaster's providing an opportunity for various sides of such issues to be presented to its listeners. The statutory basis for the Doctrine as adopted was the FCC's power to license stations—initially and for periodic renewals—if it determines that "the public interest, convenience, and necessity would be served" by a grant of the license. (Communications Act, §§ 307(d), 309(a), App. C, pp. 45a-46a). Subsequently, as a result of an FCC ruling in the *Lar Daly* case (CBS, Inc., 18 P & F Radio Reg. 238, *on reconsideration*, 26 F.C.C. 715 (1959)), Congress amended § 315 of the Act and added a sentence, which the FCC construes as a ratification of the Fairness Doctrine, referring to "the obligation imposed upon [licensees] . . . under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." (App. C, pp. 46a-47a).

The ruling could not possibly be supported by the Fairness Doctrine unless it is concluded that *all* cigarette commercials constitute a "discussion" of "views on issues of public importance," a conclusion that anyone exposed to cigarette commercials would dispute. To speak of the usual advertising patter (or pretty pictures) as a "discussion" of such "views" warps words, especially when those words are read against the exposition of the Fairness Doctrine in the FCC's report adopting the Doctrine.

Section 5 of that Act with respect to warnings of the cigarette health hazard. (App. C, pp. 48a-49a). The FCC disposed of this argument by holding that the moratorium applies only to the requirement of health warnings "in" cigarette advertising; it deemed itself free, therefore, to require broadcasters to warn listeners of the asserted health hazard elsewhere in their programming than "in" the cigarette commercials themselves.[7]

The FCC went on to argue that since, in connection with its adoption of the Cigarette Labeling Act, Congress had indicated its desire to encourage the education of the public on the asserted health hazard, it is consistent with the Act to compel broadcasters of cigarette commercials to "implement" such an educational effort by application of the Fairness Doctrine to such commercials. (App. A, pp. 57-58).

The court of appeals' opinion

The FCC's ruling was affirmed by the United States Court of Appeals for the District of Columbia Circuit.[8]

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[7] Paradoxically, however, despite its reliance on the word "in," the FCC acknowledged that that Act prevents it from requiring that health warnings be "adjacent to" the cigarette commercials or that the same amount of time be given to such warnings as is devoted to cigarette commercials. (App. A, p. 57).

[8] These petitioners filed their petitions to review the FCC's orders in the United States Court of Appeals for the Fourth Circuit. That court's jurisdiction was based on § 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a), § 2 of the Judicial Review Act of 1950, 28 U.S.C. § 2342, § 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-06, and 28 U.S.C. § 2112.

On December 18, 1967, that court, pursuant to 28 U.S.C. § 2112, transferred the cases to the court below where there was pending another petition to review these same orders. The court below had jurisdiction over the proceeding under the provisions cited in the preceding paragraph.

Chief Judge Bazelon, joined by Judge Wright, wrote the majority opinion; Judge Miller noted a dissent.

The court of appeals had considerably greater difficulty with the case than did the FCC. On the constitutional issues presented, the court observed that the Seventh Circuit's decision in *Radio Television News Directors Ass'n* (*see* n. 4 *supra*) holding the FCC's personal attack rules in violation of the First Amendment "has cast some doubt on the constitutionality of the underlying fairness doctrine" (App. B, p. 14a), an issue now to be resolved by this Court, and stated that "it may well be that some venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets." (App. B, p. 32a). The court attributed "considerable force" to the argument that the First Amendment requires that "the content of broadcasting, like that of the publishing press, must be left entirely to the licensees and ultimately to the market." (App. B, p. 31a).

The argument, however, was rejected, and the court upheld the constitutionality of the ruling. The court relied on the following considerations: the ruling does not ban any speech; the speech that might be "chilled," product advertising, "barely qualifies as constitutionally protected 'speech' "; the danger that even this speech would be "chilled" is probably marginal; the First Amendment gain is greater than the loss because the ruling serves to "redress the balance" of power among those interested in the cigarette health issue; and the ruling results in the provision of information to the public. (App. B, pp. 34a-38a). On this basis the court upheld a ruling that could not withstand

scrutiny were the Government to attempt to apply it to newspaper or other advertising.

On the statutory question, too, the court below was troubled, giving no more than "cautious approval" to the FCC's ruling. (App. B, p. 30a). The court noted that the ruling was "to all intents a novel application" of the Fairness Doctrine (App. B, p. 15a), not supported by precedent: "[E]xcept for the personal attack rules struck down by the Seventh Circuit, we know of no case in which the Commission has so specifically defined the stations' duties under the fairness doctrine." (App. B, p. 16a). The court repeated: "[A]s an extension of the fairness doctrine it [the ruling] is an unusual limitation of the licensee's discretion." (App. B, p. 24a).

The court went on to hold that, under the Communications Act, the FCC has some authority to apply the "public interest" standard of the Act to programming (App. B, pp. 18a-24a) but observed that the Commission may not "scan the airwaves for offensive material with no more discriminating a lens than the 'public interest.'" (App. B, p. 30a). As the court stated: "Especially with First Amendment issues lurking in the near background, the 'public interest' is too vague a criterion for administrative action unless it is narrowed by definable standards." (App. B, p. 24a).

Then, although the FCC had done what the court said it could not do—impose the ruling simply because it was felt to be in the public interest—, the court affirmed the FCC on the ground that, "Whatever else it may mean . . . we think the public interest indisputably includes the public health" (App. B, p. 25a), and the ruling was supportable on a public health basis.

This narrowing by the court of the "public interest" standard was felt to remove much of its "vagueness and over-breadth," which made it inadequate to support action by the FCC in the programming area. (App. B, p. 26a).

As for the Cigarette Labeling Act argument, the court of appeals, on the basis of "a relatively narrow reading of the Act" (App. B, p. 13a), determined that the "comprehensive Federal program" established by that Act did not affect "the question of the public's need for information about the nature, extent, and certainty of the danger," and hence did not bar the FCC's ruling. (App. B, p. 11a). The court distinguished sharply between *warnings* as to the asserted cigarette hazard and *information* on that subject (App. B, pp. 11a-12a); only the former was precluded by the Act, according to the court, even though the Act's statement of policy draws no such distinction but speaks of informing the public by means of a warning. One purpose of the Act, Congress declared, was to establish a program whereby

> "the public may be adequately *informed* that cigarette smoking may be hazardous to health by inclusion of a *warning* to that effect on each package of cigarettes." (App. C, pp. 47a-48a).

The court of appeals nevertheless was of the view that there is a "need for an abundant and ready supply of relevant information" on the smoking and health issue (App. B, p. 10a) and that Congress did not intend to bar actions which coerce the supplying of such information.

REASONS FOR GRANTING THE WRIT

At issue in this case are questions of substantial importance as to the FCC's constitutional and statutory authority over the content of broadcast material. As indicated in the court of appeals' opinion, these questions are related to, but extend beyond, those now before this Court in No. 2 (*Red Lion Broadcasting Co.* v. *FCC, cert. granted,* 389 U.S. 968) and No. 717 (*United States* v. *Radio Television News Directors Ass'n, cert. granted,* 37 U.S.L.W. 3247 (Jan. 13, 1969)). This case, moreover, presents an additional issue—the extent of First Amendment protection of commercial advertising—not raised in those cases and which is of importance in many contexts other than that of the FCC's regulatory authority. In addition, there is here presented an issue as to the preemptive effect of the Federal Cigarette Labeling and Advertising Act, a major regulatory statute which has not previously been before this Court.

1. The FCC ruling is a directive to every broadcaster that it must carry specific programming—material asserting the health hazard of smoking—if it broadcasts certain other specific material—commercials urging the consumption of a particular cigarette brand. The sanction available for violation of this ruling is severe, nonrenewal of the broadcaster's license and the loss of its entire investment. The basis for the ruling is the FCC's belief that the public must be informed concerning the asserted cigarette health hazard and that it would be contrary to the "public interest" for a broadcaster carrying cigarette commercials not so to inform its listeners.

Can this directive or any directive to a broadcaster as to specific programming it must carry if it wishes to broadcast other material square with the no-censorship provision of the Communications Act[9] and the First Amendment? Contemporary understanding of the First Amendment as premised on the proposition that everyone with something to say is to be permitted to present his views freely and without restraint and that Government may not require one who would speak to pay a "price" for that right[10] clearly would preclude any such directive to newspapers. Are broadcasters distinguishable for First Amendment purposes? In *Radio Television News Directors Ass'n,* as the court below recognized (App. B, p. 31a), the Court of Appeals for the Seventh Circuit "declared that the historical distinction between press and broadcasting is untenable for First Amendment purposes"; the court below believed that, on the other hand, "there may still be a meaningful distinction between the two media justifying different treatment under the First Amendment" (App. B, p. 32a); this Court, having recognized that communication by means of radio and television

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[9] Section 326 of the Act (App. C, p. 47a) provides:

"Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

[10] *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 150-51 (1967); Garrison v. Louisiana, 379 U.S. 64, 74 (1964); New York Times Co. v. Sullivan, 376 U.S. 254, 270-72 (1964); Talley v. California, 360 U.S. 60 (1960); Speiser v. Randall, 357 U.S. 513, 526 (1958).

enjoys the protection of the First Amendment,[11] must deal with this issue.

The underlying questions—whether the technical limitations on the number of broadcasting stations[12] and the nature and impact of broadcast transmissions justify discriminatory treatment of broadcasters; whether the broadcast "privilege" permits governmental restraints that could not be imposed on newspapers—are presented in *Red Lion* and *Radio Television News Directors Ass'n,* as well as in this case. The First Amendment problem in this case, however, is in a context that adds another factor that should be considered by this Court.

The FCC's actions in those cases are arguably supported by what the FCC believes to be the statutory codification of the Fairness Doctrine, and that alleged codification arguably provides a standard that permits a broadcaster to determine in advance what its obligation is in any particular circumstance and to test on judicial review the statutory validity of the FCC's ruling. Here, on the other hand, as the court of appeals found, it cannot seriously be contended that the FCC's ruling is supported by the Fairness Doctrine, and the only possible statutory basis for the ruling is the broad

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[11] United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948); Superior Films, Inc. v. Department of Education, 346 U.S. 587, 589 (1954) (concurring opinion); Estes v. Texas, 381 U.S. 532, 585, 589-90, 604, 615 (1965) (concurring and dissenting opinions).

[12] It is not without significance that these technical limitations have not prevented proliferation of broadcast outlets and the availability of unused frequencies. No longer are frequencies scarce; broadcasting stations are more numerous than the daily press. *See Radio Television News Directors Ass'n,* 400 F.2d at 1018-19.

and unspecific "public interest" standard applicable to FCC licensing of broadcasters.

This lack of any preexisting, readily ascertainable criteria governing permissible FCC action as to broadcast content means that broadcasters are compelled to guess as to what the FCC's views may be of the "public interest" and to comply even with hints from the FCC, given in such places as speeches by FCC members.[13] The relevance for First Amendment purposes is that this lack of a standard, coupled with the FCC's life-or-death power over a broadcaster's enterprise, leads to the very kind of Government-imposed self-censorship that this Court has held to be a vice of governmental intrusion into the sensitive First Amendment area.[14] Whether the FCC nevertheless, consistently with the First Amendment, may regulate broadcast content under a "public interest" standard should be determined by this Court.

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[13] The success of this technique of regulation by means of the lifted eyebrow (*see* Miami Broadcasting Co. (WQAM), 14 P & F Radio Reg. 125, 128 (1956) (Commissioner Doerfer dissenting); Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 Minn. L. Rev. 67, 118-21 (1967)) is made possible by the fact that broadcast licenses can be issued or renewed for a period of no more than 3 years. (Communications Act, § 307(d), App. C. p. 45a). Every broadcaster knows that to be independent of the views, or even the hints, that emanate from the FCC is to court its displeasure when the broadcaster's license is up for renewal and to risk nonrenewal of license, a risk that no broadcaster can afford.

[14] Whitehill v. Elkins, 389 U.S. 54, 59-62 (1967); Ashton v. Kentucky, 384 U.S. 195, 200-01 (1966); NAACP v. Button, 371 U.S. 415, 432-33 (1963); Cramp v. Board of Public Instruction, 368 U.S. 278, 287-88 (1961); Smith v. California, 361 U.S. 147, 150-52 (1959).

2. The lack of any meaningful statutory standard also presents a serious Fifth Amendment issue. The FCC in this case regarded itself as bound only by a limitless "public interest." The court of appeals determined that that standard is too vague to support any FCC supervision over broadcast content, a determination that is quite clearly correct. *See Kent* v. *Dulles*, 357 U.S. 116, 129 (1958); *United States* v. *Robel*, 389 U.S. 258, 269-77 (1967) (Brennan, J., concurring); *Arizona* v. *California*, 373 U.S. 546, 603, 624-27 (1963) (Harlan, J., dissenting). The court thus felt the need to narrow the "public interest" standard, believed that it was doing so by stating that "the public interest indisputably includes the public health" (App. B, p. 25a), and on this basis affirmed the FCC's ruling. This approach, however, is not adequate to cure the "vagueness and over-breadth" inherent in the "public interest" standard. (App. B, p. 26a).

In order for the court's purported narrowing of that standard to be at all meaningful, the court would have to set a coherent limit on what the FCC could do under the "public interest" standard, to be applicable when the next case comes up. The court's opinion does not, however, set such a limit because the court did *not* say that, in the area of broadcast content, the permissible extent of FCC regulation is limited to the public health component of the "public interest." Thus the FCC would not be prevented from seeking to justify its next programming ruling on some other asserted "public interest" rationale, and the problems that the lack of a meaningful standard create are still present despite the court of appeals' purported narrowing of the "public interest" standard.

It might be that the "public interest" would have the needed specificity were it to import considerations unique to or especially related to the conditions of broadcasting.[15] Or it might suffice were the "public interest" to import accepted criteria applicable to all advertising media.[16] But the court of appeals did not so base its public health rationale. Rather it plucked the rationale out of thin air; it was nothing more than a *post hoc* rationalization of the FCC's ruling. This will not do.

The consequences are startling. Already the FCC has proposed to bar all cigarette advertising by radio or TV on the ground that this would be a public health measure.[17] Even if Congress otherwise permits—or refuses to prohibit—cigarette advertising, the FCC proposes that the "public interest" standard in its Act permits it to impose a broadcasting bar if it deems that to be in the interest of the public health.

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[15] The "public interest" has been held to be an adequate vehicle for the exercise of delegated authority where the "standard to guide determinations" under that phrase arises from the nature of the area that is to be regulated, *see, e.g.*, N.Y. Central Securities Co. v. United States, 287 U.S. 12, 24-25 (1932), and on this basis the Court has upheld FCC licensing authority under the "public interest" standard. FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137-38 (1940); *see* FCC v. RCA Communications, Inc., 346 U.S. 86, 90 (1953); National Broadcasting Co. v. United States, 319 U.S. 190, 225-26 (1943).

[16] In the context of this case, since the basis for the FCC's ruling was its concern over the impact of cigarette advertising, that more precise standard would be the prohibition in § 5 of the Federal Trade Commission Act of "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce . . . ." 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45.

[17] Notice of Proposed Rule Making, FCC Dkt. 18434, 34 Fed. Reg. 1959 (Feb. 11, 1969).

This Court's review is called for before the mere words, "public interest," in the Communications Act can be permitted to convey on the FCC such power to legislate.

3. In upholding the constitutionality of the FCC's ruling, the court of appeals decided that the First Amendment provides less protection to commercial advertising than to other forms of expression. The court rested this decision on *Valentine* v. *Chrestensen,* 316 U.S. 52 (1943).[18] We submit that this Court should reexamine the force of that old precedent.

Valentine involved a New York City ordinance prohibiting distribution in the streets of commercial and business advertising matter; material devoted solely to "information or a public protest" was excepted. *See* 316 U.S. at 53. This Court perfunctorily rejected the argument that the ordinance could not constitutionally be applied to handbills which, on one side, advertised respondent's submarine and, on the other, protested the city's refusal to provide respondent with wharfage facilities. The Court recognized that the "freedom of communicating information and disseminating opinion" may not be unduly burdened by Government, but stated that "the Constitution imposes no such restraint on government as respects purely commercial advertising." 316 U.S. at 54. The Court had no difficulty in that case in "apportioning . . . the contents of the communication as between what is

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[18] The other cases relied on by the court of appeals, the last of which, other than Head v. New Mexico Board of Examiners, 374 U.S. 424 (1963), was decided in 1951, do not deal with product advertising, although they cover analogous situations. In *Head,* as the court of appeals observed, this Court did not reach the First Amendment question. (App. B, p. 35a).

of public interest and what is for private profit" because it was clear that respondent's coupling of the protest with his advertisement was for the purpose of evading the prohibition of the ordinance. 316 U.S. at 55.

Recent decisions of this Court indicate that *Valentine* must be reexamined. In *Cammarano* v. *United States,* 358 U.S. 498 (1959), Mr. Justice Douglas, in a concurring opinion, referring to the *Valentine* ruling as "casual, almost offhand," stated that it "has not survived reflection." 358 U.S. at 514. Mr. Justice Douglas observed that "the profit motive should make no difference" for First Amendment purposes, and that it was difficult to draw a line between "those who make their living through exercise of First Amendment rights" and those who "advertise their wares." *Ibid.*

The Court has since stressed that the commercial motive of an author or publisher does not deprive his material of constitutional protection. *See, e.g., Smith* v. *California,* 361 U.S. 147, 150 (1959). The Court has also held that the fact that statements of opinion and recitations of grievances appear in a paid newspaper advertisement is immaterial from a First Amendment standpoint. *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 266 (1964). Clearly, these holdings as to the irrelevance of the profit motive in First Amendment terms have undercut the *Valentine* rationale.

Moreover, this case, which treats cigarette commercials as both an expression of a view on a matter of public concern and as a message urging the consumption of a particular product, demonstrates that the dis-

tinction drawn in *Valentine* between "purely commercial advertising" and "information and . . . opinion" is neither valid nor easily applied in many situations. For the fact is that there is public controversy surrounding many heavily advertised commodities—drugs, automobiles, airplane travel, beer and wine, to name a few—and advertisements for these products and services may convey information and express opinions while at the same time urging purchase of the particular product advertised.

Valentine should be reexamined and not stand as a bar to First Amendment protection of truthful product advertising.[19]

4. Also at issue in this case is the scope of the preemptive effect of the Federal Cigarette Labeling and Advertising Act and whether the court of appeals, in construing that statute, applied its own notions of what would be sound legislative policy instead of fairly attempting to ascertain and apply the policy expressed by Congress.

That Act, adopted after extensive congressional consideration of the complexities and implications of the cigarette health issue and its relation to cigarette advertising,[20] states its purpose and Congress' policy to

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[19] It is not disputed that "there is no constitutional right to disseminate false or misleading advertisements." *E.g.*, Murray Space Shoe Corp. v. FTC, 304 F.2d 270, 272 (2d Cir. 1962).

[20] *See* Hearings on Cigarette Labeling and Advertising Before the House Interstate and Foreign Commerce Committee, 88th Cong., 2d Sess. (1964); Hearings on Cigarette Labeling and Advertising Before the Senate Commerce Committee, 89th Cong., 1st Sess. (1965); Hearings on Cigarette Labeling and Advertising Before the House Interstate and Foreign Commerce Committee, 89th Cong., 1st Sess. (1965).

be "to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health . . . ." § 2. (App. C, p. 47a). This "comprehensive Federal program" represents on its face a balancing by Congress of two necessarily conflicting objectives.

One objective, according to Section 2(1) (App. C, pp. 47a-48a), is that "the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes . . . ." Section 4 of the Act requires a warning—"Caution: Cigarette Smoking May Be Hazardous to Your Health"—to appear conspicuously on every cigarette package. (App. C, p. 48a).

The second major objective is also spelled out in the Act. § 2(2). (App. C, p. 48a). It is that

> "commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy [of adequately informing the public by the warning on the package] and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health."

Section 5(a) of the Act bars any requirement that cigarette packages bear any warning statement other than that prescribed by Section 4, and Section 5(b) provides:

> "No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." (App. C, p. 48a).

It is clear that Congress intended these "preemption" provisions to apply to "all Federal, State, and local authorities. . . ." S. Rep. No. 195, 89th Cong., 1st Sess. 6 (1965); H.R. Rep. No. 449, 89th Cong., 1st Sess. 5 (1965).

The court of appeals held that the Act did not preclude the FCC ruling. It determined that the Act's "'comprehensive program' was directed at the relatively narrow specific issue of regulation of 'cigarette labeling and advertising'" (App. B, p. 10a), stating that the Act was passed in response to an FTC rule requiring advertising warnings and that "nothing in the Act indicates that Congress had any intent at all with respect to other types of regulation by other agencies." (App. B, p. 11a).

This conclusion, however, overlooks the fact that when Congress was considering the cigarette health controversy the views of all Federal agencies were canvassed. The FCC's response was that cigarette advertising on radio and television should not be handled on a special basis but only as part of an across-the-board treatment of cigarette advertising in all media and that it was proposing no special action on its own. *See, e.g.*, S. Rep. No. 195, *supra*, at 13-14. Given this response, it is not surprising that neither the FCC nor its ruling was expressly mentioned in the statute. Congress could hardly have been expected to address itself in terms to the FCC's current action when the FCC had led Congress to believe that it contemplated no action.

Nor does the court of appeals persuasively support its conclusion by describing the preemptive "comprehensive program" as one dealing only with the "regulation of cigarette labeling and advertising." (App.

B, p. 10a). Admittedly, the requirement of a warning in or adjacent to cigarette advertising is barred by the "comprehensive program" since it would be a regulation of advertising. But no less is it a regulation of advertising to require statements in connection with such advertising. Moreover, the Act refers to its "comprehensive program" as one *"to deal with* cigarette labeling and advertising." (App. C, p. 47a). Certainly even if it were possible to hold that the FTC ruling is not a "regulation" of cigarette advertising, it cannot be suggested that it does not "deal with" such advertising.

The court of appeals, however, believed that there is a need not only for warnings as to the asserted health hazard of smoking but also for information on this subject and construed the statute as related only to warning requirements. But this distinction between warnings and information is not reflected in the Act. Moreover, the distinction is directly inconsistent with the Act's stated purpose (§ 2, App. C, pp. 47a-48a) to establish a program whereby "the public may be *adequately informed* that cigarette smoking may be hazardous to health by inclusion of a *warning* to that effect on each package of cigarettes . . . ." (Emphasis added).

Of course, the public may well need more information on smoking and health and, as the court pointed out (App. B, p. 9a), the legislative history of the statute refers to smoking education campaigns by both public and private groups and to congressional appropriations for Federal informational activities. The issue here, however, is whether the supplying of this information can be compelled by Government in connection with the broadcast of cigarette advertising. On this point, the policy of Congress is clearly expressed in the

Cigarette Labeling Act; that policy is that the package warning requirement should be the extent of Government compulsion allowable to assure that "the public may be adequately informed."

In addition, Congress indicated its intent to "re-examine the subject matter covered by" the legislation prior to July 1, 1969 (H.R. Rep. No. 586, 89th Cong., 1st Sess. 6 (1965)), the termination date specified in Section 10 for the provisions of the Act "which affect the regulation of advertising." (App. C, p. 49a). Congress did not want an administrative agency to affect the regulation of advertising prior to that date without express congressional authorization. The court erred in not restraining the FCC and in permitting it to assume a major regulatory role in an area in which Congress enacted a "comprehensive program" with no provision for any FCC responsibility.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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